(B)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. [redacted] 91

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA,

Petitioner,

vs.

NELLIE B. WIGGINTON.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1242

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA,

Petitioner,

vs.

NELLIE B. WIGGINTON.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Harlan F. Stone, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

PART I.

Summary and Short Statement of the Matter Involved.

As an introduction to this statement, it is proper to say that the facts upon which the issues were tried were all stipulated (R. 14, and then to 21-28). (The opinion is reported in 126 F. (2d), p. 659.)

This action at law was begun by the respondent-plaintiff, by the filing of her complaint against the petitioner-defendant on August 19, 1940, in the Superior Court of Vanderburgh County, Indiana. The case was properly removed to the District Court of the United States, for the Southern District of Indiana, on October 2, 1940, and upon appeal from that court to the Circuit Court of Appeals, the parties stipulated that, this petitioner had been duly served with summons in the State court, the cause properly removed, and the District Court had jurisdiction to render its judgment (R. 6-7).

The complaint (R. 1-5) alleged in substance that the petitioner-defendant is a fraternal benefit association incorporated under the laws of the State of Ohio, that respondent-plaintiff's decedent, Charles S. Wigginton, was issued a certificate of membership at Columbus, Ohio, on January 15, 1906 (R. 2, 4, 23-24). (His application for membership was signed August 25, 1905 (R. 22, Stip. of Facts #3); on January 2, 1914, he was issued a Class A Insurance Certificate at Columbus, Ohio (R. 5, 23-24, Stip. of Facts #5); that at the time of his death, the plaintiff's decedent was a Class A insured member in good standing, who had performed all of the conditions precedent to recovery, as had the plaintiff at the time of the bringing of the action; that the plaintiff's decedent died on November 4th, 1939, of a gunshot wound as a result of the alleged accidental discharge of a firearm, independent of all other causes.

The respondent-plaintiff claimed that she was entitled to recover Five Thousand Dollars ($5,000.00) with interest from November 4, 1939.

The petitioner-defendant filed its answer, consisting of Four Defenses, on November 2, 1940 (R. 8 to 10); thereafter and before trial, the Third Defense, a suicide defense,

was withdrawn with the consent of the respondent-plaintiff (R. 14) and likewise an amended Fourth Defense was filed before trial, on March 25th, 1941, with the consent of the respondent-plaintiff (R. 11-13).

The Amended Fourth Defense (R. 11-13) upon which the issues were actually formed, admits that the petitioner-defendant is a fraternal benefit association but adds that it was at all times authorized to do business in the State of Indiana; it admits the facts as to application for membership, the certificate of membership and the issuing of the Class A Insurance Certificate, but it points out and stresses the fact that these constituted a contract made, executed and completed in Ohio, and that under each and all of them, constituting the contract, the decedent agreed to be bound by the contract as it existed at the time of his death, that is, that he agreed to be bound by subsequent amendments to the Constitution of the Order (R. 11 to 12 and 21 to 26, Stip. of Facts #1 to 6 and 8 to 11).

This defense further says that this petitioner-defendant, at the annual session of the Supreme Council of the Order held in the year 1931, duly amended the Constitution of the Order by adopting the following amendment:

> "Nor shall the Order be liable for any death benefit when the member dies as the result of injuries sustained as a result of a gunshot wound or the alleged accidental discharge of firearms where there is no eyewitness except the member himself, in an amount greater than Five Hundred Dollars ($500.00)." (R. 12, also 24-25, Stip. of Facts #7).

This defense then says:

> "That the insured member, the said Charles S. Wigginton, did, on the 4th day of November, 1939, die as the result of injuries sustained as a result of a gunshot wound where there was no eyewitness except the member, himself" (R. 13).

The parties stipulated all of the facts (R. 14, then turn to 21 to 28) and the case was tried on April 14, 1941, without a jury (R. 15-20) upon the complaint (R. 1-5), the First and Second Defenses (R. 9 at bottom) and the Amended Fourth Defense (R. 11-13).

The stipulated facts, out of which this petitioner-defendant claims the ultimate fact of "a discharge of a firearm, where there was *no eyewitness except the member himself*", is the only ultimate fact which can be inferred as a matter of law, are the following:

> "12. On November 4, 1939, the insured member, Charles S. Wigginton, received a gunshot wound as the result of the discharge of a firearm and as the result of said gunshot wound, and independently of all other causes, died within a few seconds thereafter.
>
> "13. The insured member's office on November 4, 1939, was in room 906 on the ninth floor of the Citizens National Bank Building in the City of Evansville. About 12:15 o'clock on the afternoon of November 4, 1939, he took his shotgun and placed it on his desk in his office for the purpose of cleaning it. He also placed on his desk at the same time a can of oil, a cleaning rag, the cleaning rod and his pocket knife, and actually started to clean the gun. This was observed by Mildred McGowan, his secretary, who left the office about 12:15 P. M., and at the time she left the office he was cleaning the gun.
>
> "Reese Young was a coal dealer in the City of Evansville who purchased coal from Mr. Wigginton's Company. Shortly before 12:00 o'clock noon, he had called Mr. Wigginton by telephone and made an appointment for about 1:30 P. M. to talk to him about the problem of a shortage of coal and his desire to get regular deliveries.
>
> "After Mr. Wigginton's Secretary left the office, he also left his office and was taken to the ground floor of the building in an elevator operated by Freda Chapel. This was about 12:45 P. M. He returned to

the elevator about ten (10) minutes before his death and was taken to the ninth floor of this office building in an elevator operated by Ocie Lemon, with whom he had a conversation while on the elevator.

"Between 1:15 and 1:30 P. M., Reese Young stepped from the elevator on the ninth floor of this building and immediately after stepping from the elevator and before taking more than three (3) steps from it, he heard a sound resembling a gunshot. At this time he was in a position where he could see the length of the hallway to the door of Charles S. Wigginton's office but he could not see into the office. He did not see any person in the hallway at that time. The door of Mr. Wigginton's office opened off of the side of the hallway and Reese Young could not see into his office until he reached the doorway. He walked without accelerating his speed from that point down the hallway, a distance of fifty-three (53) feet, taking him approximately twelve (12) seconds from the time he heard the gunshot to the office of Charles S. Wigginton, and saw that the door was open and saw the body of Charles S. Wigginton lying on the floor of the office, and saw the shotgun and cleaning articles lying on the desk with the barrel of the shotgun pointed toward the chair of Mr. Wigginton behind his desk. He did not see anyone else in the room at that time.

"In a few moments several other people came into the room. A physician, Dr. Herbert Dieckman, was immediately called and it was found that Charles S. Wigginton had died from a gunshot wound to his left chest and head and that death was practically instantaneous. One barrel of the shotgun which was lying on the desk had been discharged."

(R. 26-27, Stip. of Facts 12 and 13.)

The District Court announced its Special Finding of Fact (R. 21 to 28) and Conclusions of Law (R. 28) on June 30, 1941, and rendered judgment on the same day in favor of respondent-plaintiff in the sum of Fifty-two Hundred Sixty-two Dollars and Fifty Cents ($5262.50) (R. 21).

Thereafter, an appeal was taken to, and by proper action jurisdiction was acquired by, the United States Circuit Court of Appeals for the Seventh Circuit to review the above judgment on appeal. The latter court affirmed the above judgment on appeal, to review which action this Petition is filed.

NOTE: The facts showing the jurisdiction of this Court are set out under Part II hereof.

PART II.

Statement Disclosing the Basis Upon Which It Is Contended This Court Has Jurisdiction to Review This Judgment.

A.

The original complaint was by Nellie B. Wigginton, respondent-plaintiff, a citizen of Indiana, brought in the Superior Court of Vanderburgh County, State of Indiana, against the petitioner-plaintiff, a corporation incorporated under and doing business under the laws of the State of Ohio, to recover the sum of Five Thousand Dollars ($5,000.00) with interest from November 4, 1939, which action was duly removed to the District Court of the United States for the Southern District of Indiana, and filed and docketed in the Evansville Division in the United States Court House in the City of Evansville, Indiana (R. 1-5).

Said Court rendered judgment in favor of the respondent-plaintiff and against this petitioner-defendant on June 30, 1941, in the sum of Five Thousand Two Hundred Sixty-two Dollars and Fifty Cents ($5,262.50), together with interest from June 30, 1941, and costs (R. 21).

The parties, in preparing the record for appeal from that District Court to the United States Circuit Court of Appeals for the Seventh Circuit, stipulated that the Dis-

trict Court had jurisdiction of the parties and the subject matter (R. 6-7).

B.

(1).

The United States Circuit Court of Appeals for the Seventh Circuit on February 9th, 1942, rendered its opinion (R. 61 to 74) in Cause No. 7785, reported in 126 Fed. (2) 659, and entered judgment affirming the judgment of the District Court (R. 74).

(2).

On February 20th, 1942, this petitioner-defendant, filed in the aforesaid Court in said Cause No. 7785, its petition for rehearing and brief in support thereof (R. 75). This petition was filed within the fifteen days permitted by the rules of said court, Rule 22, page 12, of the Rules of the United States Circuit Court of Appeals for the Seventh Circuit, Effective May 31, 1941.

(3).

On April 13th, 1942, said court in said cause #7785, made and entered its order (R. 75) which reads as follows:

> "It is ordered by the court that the petition and brief of appellant for rehearing heretofore filed on February 20, 1942, be stricken from the files of this Court because of the impertinent and scandalous matter contained therein.
>
> "It is further ordered by the court that the mandate of this Court in this cause issue forthwith to the District Court of the United States for the Southern District of Indiana."

C.

This petitioner duly filed in this Court, this, its printed Petition for Writ of Certiorari to the United States Circuit

Court of Appeals for the Seventh Circuit, together with its Brief in Support Thereof, and one printed certified copy of the Transcript below, together with the requisite number of printed copies of the Transcript, this Petition and the Brief in support thereof, as required by the rules of this Court, are filed with the Clerk of this Court on the 15th day of May, 1942.

D.

Wherefore, the petitioner says that this Court has jurisdiction to entertain this, its petition for writ of certiorari, and to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit, review of which is sought hereby.

(1) The jurisdictional amount is present (Title 28, Ch. 2, Sec. 41 (1) U. S. C. A.; Jud. Code, Sec. 24, as amended).

(2) The requisite diversity of citizenship is present (Title 28, Ch. 2, Sec. 41 (1) (b), U. S. C. A.; Jud. Code, Sec. 24, as amended).

(3) The petition for this writ of certiorari is filed within time (Title 28, Ch. 9, Sec. 350, U. S. C. A.).

(4) A petition for rehearing was seasonably filed (II, B, (2), *supra*) which suspends the time limited by the last cited section of the statute until disposed of.

Gypsy Oil Co. v. *Esco,* 275 U. S. 498, 72 L. Ed. 393, 48 S. C. R. 112;

N. L. R. B. v. *Mackay, etc.,* 304 U. S. 333, 82 L. Ed. 1381, 58 S. C. R 904;

The Conqueror, 116 U. S. 110, 113-4; 17 S. C. R. 510.

(5) This petition having been seasonably filed, the discretionary right or power of this Court for determination and review is invoked. Jud. Code, Sec. 240 (a), amended, U. S. C. A., Title 28, Sec. 347 (a).

Part III.

The Questions Presented.

Preliminary Statement.

Two of the questions presented, of which complaint is made, arise out of the construction of the following clause in the petitioner's Constitution and the analysis of the facts made by the Circuit Court of Appeals in determining that an ultimate fact necessary to satisfy the contract was present, whereas the reasoning processes by which the ultimate fact was found are illogical and therefore repudiated by the law of Indiana. The clause of the Constitution reads as follows:

> "Nor shall the Order be liable for any death benefit when the member dies as the result of injuries sustained as a result of a gunshot wound or the alleged accidental discharge of firearms where there is no eyewitness except the member himself, in an amount greater than Five Hundred Dollars ($500.00)."

There is no decided case in Indiana expressly construing this eyewitness clause of the petitioner's constitution; consequently, the Circuit Court of Appeals was bound to declare the law of this case, but it was bound to do so *under the general principles of law,* then prevailing in the State of Indiana. The opinion states that the court was bound to declare the law (R. 64, 1.18 to 1.26). The obligation to declare it in accordance with the then existing rules of law of the State of Indiana is, of course, implied. This implication arises because, under the burden placed by *Erie R. R.* v. *Tompkins,* 1938, 304 U. S. 64, 82 L. Ed. 1188, 58 S. C. R. 817, a Federal court cannot violate the general rules of the law of Indiana, as declared by the highest court of that State, either in drawing inferences from stipulated

facts, or in construing the meaning of the words of a contract.

It is the petitioner's contention that the opinion does violate the general rules of law of the State of Indiana in two particulars, hereinafter set out as "A" and "B" under this subdivision of the petition, which constitute the first two questions presented.

The petitioner also respectfully represents that the record in this case presents a question which is passed over by the opinion (R. 63, 1st rhet. par.), and so not decided harmfully to the petitioner, but the question is one which has arisen previously in another district court of the United States in which there is a reported opinion (*Cray, McFawn & Co.* v. *Hegarty, et al.,* (Dist. Ct., So. Div. N. Y., 1939, 27 Fed. Supp. 93, 95, Syll. 1)). It is novel, but apparently is actually bothering lawyers and judges in the courts of the United States, namely:

Does the law as declared in *Erie R. R.* v. *Tompkins,* 1938, 304 U. S. 64, deprive a Federal court of the power to take judicial notice of the laws of all of the States of the Union, as first announced in *Owing* v. *Hull,* 1935, 9 Peters, 607, 34 S. C. R. 246, 253, and ever since accepted as the law?

This last question will be presented under C, under this subdivision of the petition.

A.

The opinion declares an ultimate fact to arise from the stipulated facts by mental processes which an analysis of the opinion discloses are illogical and therefore contrary to the law of the State of Indiana.

(1).

The opinion follows the leading case of *Lewis* v. *Brotherhood Acc. Co.,* 1907, 194 Mass. 1, 79 N. E. 802, 804-807,

which first construed a clause similar in purport to the one hereinabove set out, and which is recognized as the leading authority upon the construction to be given the clause in question; namely, that the "eyewitness" need not see the actual event happen, but that the clause will be satisfied if there is an eyewitness of primary facts from which the "operating cause" of the accidental event may be inferred.

(2).

The opinion correctly draws the analogy between the canoe being paddled upon the river in the *Lewis* case and the primary facts necessary to show an operating cause in a discharge of firearms case, and declares its construction correctly in the following language:

> "What was the operating cause in the case at bar? In the Lewis case, it was the *tricky canoe being paddled in the river.* In the case at bar, it was a *loaded shotgun in the process of being cleaned.*" (The italics are ours) (R. 72, first three sentences in last rhet. par.)

(3).

The opinion then continues to set out and to analyze the facts out of which it declares there arises the inference that the witness, Mrs. McGowan, *witnessed the operating cause which caused the death* of the respondent-plaintiff's decedent. (R. 72, beginning with 4th sentence in last rhet. par., and ending with 2nd sentence in first rhet. par., p. 73).

Mrs. McGowan witnessed the gun being cleaned at 12:15, a then potential operating cause; that is, the *actual cleaning* of the gun; she never saw him alive after 12:15 P. M., and further, the record shows, the part of the transcript cited discloses, and the opinion says, that Wigginton abandoned this operating cause between twenty-five and forty-five minutes prior to his death. He left his office and went

out into the city for this period of time—after he returned, about ten minutes before his death, no one saw him. (R. 26, Stip. of Facts #13).

Remembering that it is the actual cleaning of the gun which is the operating cause, not a gun surrounded by cleaning materials (*Werner* v. *T. P. A.*, 1929, (D. C. Tex.) 3 Fed. (2) 803, aff'd 1930 (C. C. A. 5) 37 F. (2) 96, 97; *Roeh* v. *Bus. Men's Assn*, 1914, 164 Ia. 199, 145 N. W. 479, 480-482), it is apparent that the operating cause of Wigginton's death *was a new and different one* which arose during the ten minutes after he returned to his office, and no one saw him or this new, *actual operating cause* in action, while he was in the solitude of his office,—certainly Mildred McGowan did not.

(4).

The petitioner contends, therefore, that the opinion of the court below, whereby it made Mildred McGowan an eyewitness of the death of plaintiff's decedent, is not logically tenable, and the law in Indiana requires that inferences shall be reached by logical methods, and that if an ultimate fact cannot be established by a logical inference, a party must fail.

Cleveland, etc. R. R. v. *Miller, Admr.*, 1898, 149 Ind. 490, 507;

Russell v. *Scharfe*, 1921, 76 Ind. App., 191, 197.

NOTE: The Brief presents a more elaborate analysis of this error in logic.

B.

The opinion declares an ambiguity to exist in the clause in question, which ambiguity cannot arise by according to the language of the section its "popular and usual significance".

(1).

The opinion says:

> "Furthermore, we think the provision of the constitution of the appellant order under consideration in this case is ambiguous. It provides that there must be an eyewitness. Witness to what? The dying or the shooting? Surely, it cannot be said that this provision is clear as to which one is meant. We are unable to determine from a reading of the provision which one is meant. Contracts of insurance are construed most strongly against the insurance company, and so as to give protection to the insured if this can reasonably be done. Masonic Acc. Ins. Co. *v.* Jackson, 200 Ind. 472, 164 N. E. 628.
>
> "In the case at bar, there was an eyewitness to the death of the insured. Mr. Young was upon the scene within twelve seconds. It is a fair inference, which we are authorized in this case to draw, that Young saw Wigginton dying. It is reasonable to construe the policy, which is ambiguous, so as to mean that there shall be an eyewitness to the "dying". We so construe it. Young was the eyewitness to the dying. Therefore, the requirements of the policy were met."
>
> (R. 73, last two par., to top of p. 74).

(2).

The opinion states its own ambiguity, that the clause in question requires an eyewitness to the accidental discharge, (which every other court in the United States has said it means), or it may be satisfied by an eyewitness to the "dying" (which no other court has said).

Since the opinion also says that the contract requires the *operating* cause to be observed (R. 72, 1st three sentences in last rhet. par.), an eyewitness to the "dying", who only observed an *operated* cause, the effect, the "dying", by the opinion's own standard, cannot establish the ultimate fact necessary for recovery by the plaintiff, as stated by

the opinion, itself—the witnessing of the "operating cause".

The concept of an eyewitness to the "dying" also must be read in connection with the language found in the clause, "except the member himself". When so read, we create the fantastic thought that a person is an "eyewitness" to his own death. A construction of language which leads to such a fantastic concept is not in accord with that adopted by normal men.

The idea of a contract requiring recovery to be based, even optionally, upon a person witnessing death, is so morbid that it likewise creates a thought not found in the minds of normal persons.

(3).

Therefore, the ambiguity is based upon an unusual and fantastic construction of language. But, the law of Indiana requires, *even in the case of insurance companies,* that language in an insurance contract must be construed by giving to words their "popular and usual significance". It also declares that liability cannot arise "by imputing an unusual meaning to the language used in an insurance contract".

Shedd v. *Automobile Ins. Co., etc.,* 1935, 208 Ind. 621, pp. 628-629 (Discussion of Sylli. 5 and 6-8);

Auto Underwriters v. *Camp,* 1940, 217 Ind. 328, 342 (Discussion of Syll. 10) also 347 (Discussion of syll. 12).

Since the case of *Lewis* v. *Brotherhood,* 1907, 194 Mass. 1, *supra,* no case in thirty-five years, except the instant case, has thought that there was an ambiguity in the language of this clause or similar clauses of other fraternal benefit associations. The "operating cause" construction in all of the other cases in the United States has led to the logical conclusion that an eyewitness who came upon a man dead,

surrounded by a gun with cleaning materials, had not witnessed an *operating* cause, but an *operated* cause; that is, an effect, and that therefore, such a witness did not comply with the provisions of the clause and entitle the beneficiary under the policy of such a decedent to a recovery under the clause (See *Werner* case and *Roeh* case, III A (3), this subdivision of this petition).

Therefore, except for the declared ambiguity, the witness, Reese Young, who saw no more than the witness did in the *Werner* case and the *Roeh* case, would not be an eyewitness of any facts which would permit a recovery under this clause now in question.

However, the alleged ambiguity declared in this opinion, that there may be an eyewitness to the "dying", makes it possible under this opinion for Reese Young to qualify as an eyewitness, upon which recovery can be based; but since the alleged ambiguity rests upon a construction of language which is contrary to the express and declared law of the Supreme Court of Indiana (Sub-point immediately supra), the alleged ambiguity does not arise under the law of Indiana, or is invalid under the law of Indiana. Therefore, the recovery allowed in this case upon the testimony of Reese Young is contrary to the law of Indiana, and the Circuit Court of Appeals in this case has allowed a recovery which is contrary to the declared law of the State of Indiana.

C.

The record, if reviewed, will permit this Court to declare the power of a Federal court to take judicial notice of the laws of all the States in the light of *Erie R. R.* v. *Tompkins*, 1938, 304 U. S. 64.

(1).

The plaintiff-respondent raised in the District Court, by her objections to the introduction of some of the stipulated

evidence (R. 16, bottom of p. to top p. 17, also pp. 18-19), and by her briefs, the question of the power of the District Court of the United States sitting in Indiana, to take judicial notice of the laws of Ohio, when the petitioner-defendant failed to prove those laws under the provisions of the Indiana law with reference to proof of foreign laws. The District Judge overruled the objection, and, in effect, held that it was not necessary, but he wrote no opinion.

The Court of Appeals disposed of the issue in the following language:

> "We lay to one side the question of the validity of the amendment to the constitution and proceed to a determination of whether under the undisputed facts in this case there was an eyewitness within the meaning of the amendment."
> (R. 63, 1st full rhet. par.)

Therefore, the question has not been decided by any opinion of either of the courts below.

(2).

The reference to the record and the authorities which need be cited in order to show how this question arises are too involved to permit their being presented in a concise manner in this part of the petition. However, we have presented them in the brief at pages 49 to 52.

(3).

We admit that the question was decided in favor of the petitioner by the District Court, but it is a question which apparently is beginning to bother the bench and bar of the Federal courts, and we respectfully request the court to grant this petition for the purpose of settling this question before some other litigant, less able to finance an appeal, loses his rights in some District Court of the United States

through a misapprehension of what the law is upon this question.

The petitioner's counsel do not believe that the power to take judicial notice of the laws of all the States has been lost; but if it has been, it is easy enough for a party forewarned to make proof of the law of a State, other than that in which the court is sitting, if he is apprized of the necessity of doing so before he begins the trial of his case in Federal court. Certainly, impecunious litigants will be benefited and protected against any misunderstanding as to the law on this question, if this Court will exercise the writ to declare the law upon that question, as well as the other questions presented in this petition.

Part IV.

Reasons Relied On for the Allowance of the Writ.

Preliminary Statement.

The reasons for granting the writ are closely connected with the Questions Presented. Therefore, in the Brief, we shall enlarge upon the following reasons, as well as upon the Questions Presented. The petitioner respectfully requests the Honorable Justices to consider the Brief in connection with this part of the petition for the writ.

A.

The opinion, insofar as it arrives at the ultimate fact that Mrs. McGowan was an eyewitness to the "operating cause" of the death of the respondent-plaintiff's decedent (R. 72, last par. and 73, 1st par.) is sustained by reasoning processes which are illogical and not "in accordance with correct and common modes of reasoning", and to that extent it is contrary to the local law of Indiana. (See authorities under III A (2), p. 11, this petition.)

It should be remembered that the primary facts are stipulated. Therefore, this petitioner is not asking for a review of a question of fact. When the facts are undisputed or stipulated, the process of inferring the presence of an ultimate fact from primary facts requires the drawing of an inference which is valid as a logical inference. This process involves a question of law in Indiana, as well as in every other known jurisdiction where Anglo-Saxon jurisprudence is accepted as the jurisprudence of the State.

(1).

This Court, even before *Erie R. R.* v. *Tompkins,* has granted the petition for the writ, where a decision and opinion of the United States Circuit Court of Appeals for the Seventh Circuit presented conflict between the law of Indiana as declared by the Federal court and the law as declared by the Supreme Court of Indiana.

Forsythe v. *City of Hammond,* 166 U. S. 506, 41 L. Ed. 1095, 17 S. C. R. 665.

(2).

It is submitted, that when this Court, through *Erie R. R.* v. *Tompkins,* directed the Federal courts to follow the laws of the various States, this Court inferentially assumed a burden to grant relief to litigants, where a Federal court, exercising intermediate appellate jurisdiction, has erred in determining the law arising out of a factual situation, which has not been ruled upon by the State court, but which ruling upon the new factual situation violates established general rules of law of the State involved.

Is it not persuasive, also, that the Supreme Court of Indiana has declared, upon the question of ultimate review, that under the Constitution of Indiana, it possesses not only the power, but is burdened with the duty to review all deci-

sions of the Appellate Court of Indiana, in which the charge is made that the Appellate Court *has violated a ruling precedent of the Supreme Court* or has decided a new question erroneously, notwithstanding a legislative enactment denying the Supreme Court the right.

Warren v. *Indianapolis Telephone Co.*, 1940, 217 Ind. 93, 114.

B.

The second question and error presented involves the creation of an ambiguity out of the wording of the eyewitness clause by giving to the language of this clause a meaning which is not in conformity with its "popular and usual significance", but which imputes an "unusual meaning to the language used in an insurance contract".

Such construction of language is contrary to that permitted by the law of Indiana.

(See authorities cited, III B, p. 12, this Petition.)

(1).

No other court, to our knowledge, has ever held that this language was equivocal, or permitted the drawing of the ambiguous meaning which the court below has drawn. These contracts have been construed at least since 1907, the date of the decision in *Lewis* v. *Brotherhood, etc.*, 1904 Mass. 1, 79 N. E. 802, 804-807, *supra*, and no court has found an ambiguity therein.

(2).

Although the question of conflict of decision between United States Circuit Courts of Appeal on matters of the general law, not involving a Federal question, is no longer a persuasive ground for exercising the power to issue the writ here sought, nevertheless the fact that the opinion below, by declaring the alleged ambiguity, makes a person

who has observed the "operated" cause, the effect,—death —a qualified witness, where other cases (*Werner* v. *T. P. A.* and *Roeh* v. *Bus. Men's Assn. etc.* Part III A(3), *supra,* this Petition, p. 12), not recognizing that there is any ambiguity, have held such a person did not fulfill the obligation of the clause, because he had not witnessed the "operating" cause, should influence the court in granting the writ.

This is especially true where the Federal court is attempting to make new law for a State and in so doing, not only does not recognize existing decisions of other courts (*Werner* v. *T. P. A., Roeh* v. *Bus. Men's Ass'n, supra,* Part III, A, (3), this Petition, p. 12), which we have the right to assume the Supreme Court of Indiana would recognize, but also circumvents the effect of such decisions by means of an alleged ambiguity, which ambiguity will not stand the test laid down in the decided Indiana cases (*supra*), Part III, B, (3), this Petition, p. 14.

C.

As to both A and B, *supra,* of this Part IV of this Petition, it is not a valid answer that the Supreme Court of Indiana is not bound to follow the opinion which the petitioner seeks to have reviewed.

First, if a Federal court undertakes to decide a question of State law under *Erie R. R.* v. *Tompkins,* and decides it contrary to State law, we again submit, that by granting that right to the lower Federal courts, this Court inferentially said to all litigants: "We will police those courts and see that their opinions and decisions conform to the law of the State involved".

Second, the opinion of a court, having the dignity, the standing, and the reputation for correctness of decision enjoyed by the United States Circuit Court of Appeals for the Seventh Circuit, has such great weight that factually,

the strong probability is, that the courts of Indiana will accept that opinion on its face and will brush aside all efforts of lawyers to urge the errors inherent in it which have been pointed out in this Petition. Any lawyer who has gone through the frustrating experience of attempting to overrule a prevailing precedent based upon illogical reasoning, knows that what has been said is factually honest.

Thus, the very wrong sought to be corrected by *Erie R. R.* v. *Tompkins*, the intrusion upon litigants of the opinions of the Federal courts, which are contrary to the laws of that State, again will be fostered if opinions, such as the one involved, which are contrary to the law of a State, are permitted to stand.

Third, it will not do to say to this petitioner, "You could have stopped in the State court, you came here voluntarily, uninvited and unwanted, therefore we will grant you no relief." *Erie R. R.* v. *Tompkins* grants this litigant the right to a decision based upon the law of Indiana and limits the right to nothing more. Therefore, one who comes into a Federal court today, no longer can be charged with seeking an unconscionable advantage or with an ulterior motive. Factually, greater impartiality of juries (At the time of removal, an agreement to try by stipulation and before the court without jury is seldom, if ever in existence. It was not in this case), greater skill and impartiality of judges, easier and simpler methods of procedure, are some of the considerations which have large persuasive effect.

Can it be said that these considerations are dishonorable?

Even so, the Congress of the United States has not seen fit to further limit this petitioner's right to invoke the jurisdiction of the courts of the United States than by the present statute upon the subject, although it has the power to do so. *Gaines* v. *Fuentes*, 1876, 92 U. S. 10, 23 L. Ed. 524. Therefore, to refuse to grant the writ solely

because the petitioner exercised a right which the Congress has not seen fit to deny him, would amount to judicial legislation which this Court has zealously avoided.

As to Paragraphs Second and Third hereof, the petitioner respectfully invokes the doctrine that the factual necessities and actualities of a situation will be recognized behind the bare legal rule (that Indiana courts are not bound by the opinion in question), as that doctrine is expressed by this Court in *City of Indianapolis* v. *Chase National Bank, etc.,* 1941, — U. S. —, 86 L. Ed. p. 27, at p. 29 (headnotes 1 to 3), and in the dissenting opinion of Mr. Justice Frankfurter and the Chief Justice, in *Glasser* v. *U. S.,* — U. S. —; 62 S. C. R. 457 at 473.

D.

The effect of the opinion in question is to destroy the contract which this petitioner, a fraternal benefit association, has made with its members by the democratic process, whereby the members, themselves, in conventions attended by duly elected representatives, decide what contracts should be made, by constitutional amendments, in order to conserve its funds and to place all members on an equal footing (*U. C. T.* v. *Smith,* 1911 (C. C. A. 7), 192 Fed. 102, 102-5).

(This statement elaborated in Brief, pp. 57-61.)

The opinion, because it will be followed by many courts (see Point C, above this Part IV, of this Petition), affects, not only the amount involved, but also the assets of and the actuarial problems of this petitioner. Likewise, it will affect the assets of and the actuarial problems of similar associations having like or similar clauses in their constitutions and contracts. The actual amount of property rights involved and affected by the opinion, not only in

Indiana, but throughout the United States, far exceed the sum involved. It likewise affects the interests of the many members of this petitioner and associations similarly situated, in the assets of their associations, as well as their personal policy interests.

Because of this large public interest affected, and the large amount of property factually affected, by the opinion sought to be reviewed, this Petitioner respectfully prays that this Court issue the writ prayed.

(1).

The Petitioner knows that the considerations urged immediately above are not factually presented upon the record. However, once jurisdiction to entertain the writ is established, the question of whether a showing is made sufficient to justify the court to exercise its discretionary power to grant the petition and issue the writ is a mixed question of law and fact, lying peculiarly within the jurisdiction of this Court, not necessarily dependent upon the record as disclosed by transcript.

Therefore, the Petitioner has assumed that it is proper to support the facts hereinabove last urged by affidavits attached to this Petition and made a part hereof, solely for the purpose now herein set out.

(2).

Your Petitioner therefore respectfully says that this Petitioner had outstanding and in effect on December 31, 1941, 77,894 insurance certificates containing the clause in question, with potential death liability of $343,534,620.00, of which certificates, 2,007 were issued and outstanding to residents of the State of Indiana, as shown by the affidavit

of A. W. Franklin, Supreme Secretary, which is attached to this Petition, marked "Exhibit A," and offered as a part hereof, for the purposes last hereinabove set out.

Your Petitioner further respectfully says that the Iowa State Traveling Men's Association is a fraternal benefit association, which has in its contract of insurance a clause similar to the one construed in the opinion sought to be reviewed; that said association, on January 1, 1942, had issued and outstanding 63,842 insurance certificates or policies containing said clause, of which 1,134 were held by residents of Indiana, all as shown by the affidavit of Currie C. Chase, its Secretary-Treasurer, which is attached to this Petition, marked, "Exhibit B," and offered as a part hereof, for the last mentioned purpose hereinabove set out.

Your Petitioner further respectfully says that the Woodmen of the World Life Insurance Society is a fraternal benefit society, which has in its contract of insurance a clause similar to the one construed in the opinion sought to be reviewed; that said association, on January 1, 1942, had issued and outstanding 74,733 benefit certificates containing said clause, all as shown by the affidavit of Farrar Newberry, its Secretary, which is attached to this Petition, marked "Exhibit C," and offered as a part hereof, for the last mentioned purpose hereinabove set out.

E.

This Petitioner finally says that the question of whether or not the decision of this Court in *Erie R. R.* v. *Tompkins*, 1938, 304 U. S. 64, has destroyed the right of the courts of the United States to take judicial notice of the laws of all of the States of the United States, as first announced in *Owing* v. *Hull*, 1835, 9 Peters 607, 625, 34 S. C. R. 246, 253,

is of such importance that this Court will confer a boon upon litigants in, and the bench and bar of, the Federal courts, if it will declare the law upon the question.

The question arose in the District Court of the United States for the Southern Division of New York, *Cray McFawn & Co.* v. *Hegarty, Conroy & Co.*, 1939, 27 Fed. Supp., 93, 95, Syll. 1, aff'd Per Curiam, question not discussed, 1940, 109 F. (2) 443. It was strenuously advanced by the respondent, in both Federal courts below, that the right had been taken away, and apparently seriously considered at the oral argument in the Circuit Court of Appeals, by Lindley, District Judge.

These facts evidence the uneasiness and uncertainty of lawyers and judges over this question, which can easily cause an impecunious litigant, who cannot afford an appeal, or whose attorney is afraid to try one (incidentally most of us are scared to death of Federal courts and procedure), to lose valuable rights, if a District Court Judge holds that the right has been destroyed.

Wherefore, your Petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said United States Circuit Court of Appeals for the Seventh Circuit, had in the case numbered and entitled on its docket, No. 7785, *Nellie B. Wigginton, plaintiff-appellee,* v. *The Order of United Commercial Travelers of America, defendant-appellant,* to the end that this cause may be reviewed and determined by this Court to the extent prayed in this Petition, and as provided for by the statutes of the United States; and that the judgment herein of the said United States Circuit Court of Appeals

for the Seventh Circuit be reversed by the Court, and for such further relief as this Court may deem proper.

This —— day of May, 1942.

Respectfully submitted,

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA,
Petitioner,

By RICHARD T. RECTOR,
of Columbus, Ohio;
E. W. DILLON,
of Columbus, Ohio;
CHARLES M. LA FOLLETTE,
of Evansville, Indiana;
HERMAN L. MCCRAY,
of Evansville, Indiana;
F. BAYARD CULLEY, JR.,
of Evansville, Indiana;
Counsel for Petitioner.

EXHIBIT A.

THE SUPREME COURT OF THE UNITED STATES
SEVENTH DISTRICT.

No. —.

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA

v.

NELLIE B. WIGGINTON.

Affidavit.

STATE OF OHIO,
County of Franklin, ss:

A. W. Franklin being first duly sworn says that he is the Supreme Secretary of The Order of United Commercial Travelers of America; that said association indemnifies the beneficiaries of its certificate holders for death resulting from accidental means, and that the contract of insurance issued to its said certificate holders contains, among other things, the following:

> "Nor shall the Order be liable for any death benefit when the member dies as the result of injuries sustained as a result of a gun shot wound or the alleged accidental discharge of firearms where there is no eye witness except the member himself, in an amount greater than Five Hundred ($500.00) Dollars."

Affiant further says that as of December 31, 1941, there were outstanding approximately 77,894 certificates containing the above quoted eye witness provisions with a potential death liability of $343,534,620, of which 2,007 certificates were issued and outstanding to residents of the State of Indiana.

Further affiant sayeth not.

A. W. FRANKLIN.

Sworn to and subscribed before me this 29th day of April, 1942.

LLOYD WEEKS,
[SEAL.] *Notary Public, Franklin Co., O.*

My commission expires Aug. 24, 1943.

EXHIBIT B.

THE SUPREME COURT OF THE UNITED STATES
SEVENTH DISTRICT.

No. —.

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA

v.

NELLIE B. WIGGINTON.

Affidavit.

STATE OF IOWA,
County of Polk, ss:

Currie C. Chase, being first duly sworn, says that he is the Secretary-Treasurer of the Iowa State Traveling Men's Association; that said association indemnifies the beneficiaries of its policy or certificate holders for death resulting from accidental means, and that the contract of insurance issued to its said certificate or policy holders contains, among other things, the following:

> "H. The Association shall not be liable for death, disability or specific loss in excess of one-tenth of the amounts of these by-laws provided for indemnity for death, disability or specific loss when said death, disability or specific loss arises from or is effected or aggravated by any of the following causes, conditions or acts or results therefrom, to-wit: * * * death or injuries resulting from the discharge of firearms where the member (or beneficiary in case of death of the member) is unable to prove by actual eye witness other than himself or the claimant, the nature and circumstances of the discharge of the firearms and the infliction of the injury."

Affiant further says that as of January 1st, 1942, there were outstanding approximately 63,842 certificates or policies containing the above quoted eye witness provisions, of

which approximately 1,134 were held by residents of Indiana.

Further affiant sayeth not.

CURRIE C. CHASE.

Sworn to and subscribed before me this 30 day of Apr., 1942.

EARL C. MILLS,

[SEAL.] *Notary Public, in and for Polk County, Iowa.*

My commission expires July 4, 1942.

EXHIBIT C.

IN THE SUPREME COURT OF THE UNITED STATES
UPON APPLICATION FOR WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE SEVENTH CIRCUIT.

No. —.

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA

v.

NELLIE B. WIGGINTON.

Affidavit.

STATE OF NEBRASKA,
County of Douglas, ss:

Farrar Newberry, being first duly sworn, deposes and says that he is the Secretary of the Woodmen of the World Life Insurance Society, a fraternal benefit society incorporated under the laws of the State of Nebraska; that said Society pays double indemnities to beneficiaries of the holders of its benefit certificates for death resulting from accidental means; and that the Constitution, Laws and By-laws of said Society, which are a part of every benefit certificate

issued by it, contains among other things the following provision:

> "The Society shall not be liable for the payment of double indemnity under any beneficiary certificate providing for double indemnity in case of the death of the member by accident, where it is claimed that death resulted from accidental drowning, cutting, poisoning, hanging, inhalation of gas, discharge of firearms or shooting, unless at least one person other than the member was an eye witness of such drowning, cutting, poisoning, hanging, inhalation of gas, discharge of firearms, or shooting."

Affiant further states that as of January 1, 1942, the Woodmen of the World Life Insurance Society had outstanding Seventy-four Thousand Seven Hundred Thirty-three (74,733) benefit certificates which were subject to the above quoted eye witness provision.

FARRAR NEWBERRY,
Secretary of the Woodmen of the World Life Insurance Society.

Sworn to and subscribed before me this 30th day of April, 1942.

[SEAL.] KATHERINE V. PETERSON,
Notary Public in and for Douglas County, Nebraska.

My commission expires September 1, 1944.